90-156

No. 89-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT B. MACHEN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT B. MACHEN
Pro Se
1418 South 21 Street
Arlington, VA 22202
(703) 920-3091

July 21, 1990

QUESTIONS PRESENTED

1. Did the trial court abuse its discretion in denying petitioner's 28 U.S.C. 2255 Motion by holding that no violation of petitioner's statutory rights under 18 U.S.C. 6002-6003 occurred even though the government used the compelled immune testimony of petitioner to gain his conviction. Although the United States Court of Appeals for the Fourth Circuit found no error in the trial court's denial of relief on the issue, the Court of Appeals for the District of Columbia gave an opposite ruling in United States v. Oliver North. The North case was reversed for lack of a full hearing on the issue of whether or not the government used immune testimony.

2. Did the trial court abuse its discretion in denying petitioner's 28

U.S.C. 2255 Motion alleging ineffective assistance of counsel so serious as to deprive the petitioner of a fair trial when petitioner showed that counsel's performance was seriously deficient and that petitioner's defense was prejudiced?

3. Did the trial court abuse its discretion in denying petitioner's 28 U.S.C. 2255 Motion alleging that perjury, which was known to be false by the prosecutor, was used to gain the indictment and conviction of the petitioner?

PARTIES TO THE PROCEEDING

The parties before this Court are the same as those identified in the caption of this petition.

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No. 89-_____

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October Term, 1989

ROBERT B. MACHEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Robert B. Machen, respectfully prays that a writ of certiorari issue to review the judgment of the Fourth Circuit in this proceeding entered on April 26, 1990, with the Petition for Rehearing denied on May 22, 1990.

OPINIONS BELOW

The trial court's opinion is shown in the Appendix at A-5. The opinion of the Fourth Circuit Court of Appeals is unpublished, and included in the Appendix at A-3. The Order denying rehearing, entered on May 22, 1990, is included in the Appendix at A-1.

JURISDICTION

The final judgment of the Fourth Circuit Court of Appeals was entered on May 22, 1990, in the form of an Order denying rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves United States Constitution Amendment Five, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

" and the right to effective assistance of counsel clause of the Sixth Amendment to the Constitution of the United States.

Federal Statute 18 U.S.C. 6002 provides:

> ***no testimony or other information compelled under the order (or any other information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case except for a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

Criminal proceedings in which the petitioner, Robert B. Machen, became involved began with a visit to petitioner's law office by an investigator with the Internal Security Division of the Internal Revenue Service on March 20, 1984. Petitioner was served with a subpoena for a variety of his law office

a 28 U.S.C. 2255 Motion. The trial court denied the motion on September 5, 1989. The Court of Appeals for the Fourth Circuit denied the appeal on April 26, 1990, and the Motion for a Rehearing was denied on May 22, 1990.

The United States District Court for the Eastern District of Virginia, Alexandria Division, empaneled Grand Jury 84-2. One Grand Jury 84-2's target was Mark Kellogg (M.K.). The original question concerning M.K. was whether or not he received a fee from the Hill Estate and, if so, did he have a conflict of interest. In the course of the investigation, through the guidance and urging of an Assistant U.S. Attorney [AUSA] and an IRS agent named Rice, petitioner became a "target" of the Grand Jury investigation. Unaware he was a "target," petitioner appeared before Grand

Jury 84-2 pursuant to a subpoena and Order of Immunity. On 1 November 1985, the District Court discharged Grand Jury 84-2 which had not indicted petitioner.

In September 1987, Grand Jury 87-2 indicted petitioner on six counts. Despite the Order of Immunity under which petitioner appeared and 18 U.S.C. 6002-6003, no perjury or false declaration count was involved. On October 7, 1987, a superseding indictment replaced the original six-count indictment with seven counts. There followed an active motions practice respecting discovery, dismissals, and continuances. **At no time, however, did counsel for the defense file a motion to compel the government to show that the evidence it intended to use at trial was other than the compelled immune testimony. The use of the compelled evidence was prohibited by 18 USC 6002-6003.**

The case went to trial on Monday, December 7, 1987. The court denied defense motions for continuance based on the death of defense [expert] witness's father. On Monday, December 7, the government presented its case in chief. On Tuesday, the defense put on its case. The trial Court permitted arguments on Wednesday. On Thursday, the jury returned its verdict. On January 8, 1988, petitioner was sentenced and the trial court denied petitioner's first FRCrP Rule 33 motion wherein after trial an independent witness, William Bundren, Esquire, came forward after he learned of petitioner's conviction and presented evidence to show that he was present when Dorothy Machen instructed Rosenbrook before January 30, 1984, to correct the records that were alleged by Rosenbrook to have been changed after the grand jury

issued its subpoena on March 20, 1984. On January 15, the trial court denied petitioner's second Rule 33 Motion. Four independent witnesses presented testimony (by affidavit) to show that petitioner was not in his office on the date of the alleged incident and could not have instructed Rosenbrook to alter the records as she alleged. The January 8, 1988, motion, along with the case in chief, was appealed to the Circuit Court of Appeals for the Fourth Circuit. On July 15, 1988, the trial court dismissed petitioner's third Rule 33 Motion, without prejudice. Petitioner presented evidence to show that the Thacher records that were alleged by Rosenbrook to have been misappropriated, secreted away and destroyed by petitioner, were in fact kept by Thacher and produced after the government's case was presented. A petition for a Writ of Certiorari was

filed and subsequently denied on March 6, 1989. The sole issue was whether or not petitioner's Fifth Amendment rights were violated by permitting the jury to be told that petitioner invoked a Fifth Amendment claim when testifying before the grand jury.

Facts

Susan Rosenbrook, the chief witness for the Government, testified that following the issuance of a Grand Jury subpoena on March 20, 1984, petitioner instructed her to change the law office overhead account 1983 (receipts) summary sheet. The summary sheets were simply the totals of the quarterly receipts and payments into and out of the overhead account (no daily or quarterly entries were in question). She also testified that <u>on the same day</u> petitioner misappropriated, secreted away, and

destroyed the original copies of the records that had been provided to the second law partner on a routine basis for the 1982 and 1983 calendar years. Additionally, she testified that petitioner instructed her on the same day to add white out to cover the initials MK found on four checkbook stubs (the checkbook stubs were yellow). She further claimed that petitioner had on more than a dozen but less than a hundred times following her interview with Investigator Rice on March 27, 1984, petitioner asked her to change the entire set of overhead account records. This, as shown below, would be the same records kept by Judge Swersky since the morning of March 24, 1984. Rosenbrook and the government did not know that Swersky had absolute possession and control of the records from March 24, 1984, until they were turned

over to the government on January 30, 1985. Rosenbrook even went so far as to testify that petitioner had invited her to his house to make changes to the entire set of records (not knowing at the time of her testimony of Swersky's having the records). Following the presentation of the government case and during the defense's case, when the government learned that Swersky had retained the entire set of records from March 24, 1984, to January 30, 1985, and thereafter the government had possession of the records, Assistant U.S. Attorney Melson then began an attempt to show by his questioning and theorizing--Wasn't it possible for the alleged act to have taken place on March 21, 1984? Later he claimed to the jury and argued <u>without evidence to support his statement</u> that the alleged claims testified by Rosenbrook did take place on

March 21, 1984. (See, however, the after-discovered evidence shown below that completely negates the claim of the government.)

Rosenbrook, however, testified on cross examination that she had told Investigators Rice and Anderson on June 25, 1984, that petitioner didn't instruct her to alter the records in response to their specific questions on that point. Investigator Anderson falsely denied having been at the June 25, 1984, meeting and Rice did not report her response but, instead, falsely reported in his memorandum that Rosenbrook had claimed that she had said that Machen had asked her to alter the summary sheets.

Petitioner, by contrast, denied having ever instructed Rosenbrook to change the records, add any whiteout to any checkbook stubs and denied taking or destroying

Thacher's records.

On June 7, 1984, petitioner, through his attorney Alfred Swersky, turned over to the Government copies of all the information which was later turned over to the Grand Jury on January 30, 1985. The information provided included the 1983 corrected summary sheets and the cancelled checks containing the same information found on the checkbook stubs before Rosenbrook put the whiteout on the stubs. Petitioner and his wife and bookkeeper, Dorothy, testified that Dorothy found that Susan Rosenbrook had made a transposition error in the 4th quarter 1983 overhead account records. Susan Rosenbrook was advised by Dorothy prior to January 30, 1984, to make the correction so that the records would correctly reflect an accurate accounting of the overhead records. The error was dis-

covered by Dorothy Machen as she prepared to file petitioner's business license tax before January 31, 1984. A certified copy of the business license application filed January 30, 1984, was introduced into evidence to show that the corrected amounts were reported on petitioner's taxes.

Susan Rosenbrook readily admitted during her earlier interviews that she had made mathematical changes to the records. Rice reported that she claimed that the correction and white outs were made during the weekend of March 24, 1984. During a different interview, Rice reported that she claimed to have made the changes on March 26, 1984. On February 5, 1985, she made a sworn written statement that said the changes were made on March 22, 1984. When pressed at trial during cross examination, Rosenbrook admitted that she

could not say on which date the alleged incidents took place.

During trial, petitioner produced evidence to show that on March 21, 1984, he was in Warrenton, Virginia, taking depositions all day; on March 22, 1984, he was in the Bethesda Naval Hospital and had 37 x-rays taken, each marked with the date and time; and on Friday, March 23, 1984, he was in trial all day with clients waiting for him when he arrived at 8:00 a.m. and finally all the overhead account records were turned over to his attorney on March 24, 1984, at 8:30 a.m. and at no time thereafter did petitioner ever see the records except to pass them from his attorney to the U.S. Attorney just prior to the grand jury hearing of January 30, 1985.

The former U.S. Attorney for the Eastern District of Virginia, Brian

Gettings, testified as Mark Kellogg's attorney he reviewed the records in the late afternoon of March 22, 1984. Judge Alfred Swersky testified that he received the records at 8:30 a.m. on Saturday, March 24, 1984, and kept the records until turned over to the Grand Jury on January 30, 1985. Petitioner's defense was not only had he not requested that the records be changed nor had he destroyed the records but he had no opportunity to instruct Rosenbrook to change the documents between the time the subpoena was issued and his turnover of the records to his attorney. Petitioner's claim was that any alleged requested change to the records after they were shown to Kellogg's attorney (Mr. Gettings) or turned over to his own attorney for retention would be incredibly unbelievable.

After trial, William Bundren, an

attorney who at one time worked in the office with Dorothy Machen, swore by affidavit that he heard Dorothy Machen instruct Susan Rosenbrook to make necessary changes to the 1983 overhead account records as he prepared and discussed with Dorothy Machen the preparation of his business license tax which also had to be filed by January 31, 1984.

As stated above, Susan Rosenbrook admitted that petitioner "didn't instruct her to make changes to the records" (after March 20, 1984) but "she got that impression," and even though Rosenbrook testified that she told Investigators Rice and Anderson the same statement on June 25, 1984, the Government argued to the jury (but had no presentation of evidence to support the argument) that the changes were made on March 21, 1984. After trial

and sentencing, both Dorothy Byers and James Byers swore by affidavit that they were in petitioner's office due to an uncancelled appointment between 7:40 a.m. and 9:45 a.m. on March 21, 1984. They swore that petitioner was out of his office and were told after 9:00 a.m. by the secretary petitioner was working on the "Culpeper Case" in Warrenton, Virginia, which was approximately 60 miles from petitioner's office. The time covered by the Byers's testimony was during the time the changes were alleged to have been requested and made and the Thacher records were alleged to have been misappropriated, secreted away and destroyed. The court instructed the jury that the government did not have to prove with specificity the date the alleged incident took place.

Professor Mark Kellogg, the person

under investigation, testified during a Grand Jury appearance while under an Order of Immunity that he had caught Susan Rosenbrook adding white out to the checkbook stubs and in no uncertain terms required her to stop making the white outs and leave the checkbook stubs alone. Mark Kellogg further testified that petitioner was not in the office and did not return to the office for a "couple of days" after he (Kellogg) had caught Rosenbrook adding the white out to the checkbook stubs. Mark Kellogg was not, however, called as a defense witness by trial counsel.

Mary Keough also read about petitioner's conviction and came forward and verified by affidavit that she was in petitioner's office before he arrived on March 23, 1984. She also stated that she went to court and was in court with him all day and saw him go to another office

after 4 p.m. when he did not return with her to his office on Friday, March 23, 1984.

According to the sworn affidavit of Mary B. Cusick, who also came forward after trial, she was present on March 23, 1984, at approximately 5:15 p.m. when petitioner returned to his office and Mark Kellogg told petitioner about and showed Machen the checkbook stubs that had been whited out by Susan Rosenbrook. Mary Cusick went on the say that there was much swearing and yelling as the white outs were pointed out to petitioner.

The Court, upon being presented the affidavits described above as newly discovered evidence, found that it was cumulative and impeaching and that impeachment of Government witnesses by evidence that is discovered after trial is inadmissible.

Issue I

To better understand the significance of counsel's failure to file a motion to compell the government to show that their evidence was independent of the immune testimony and to dismiss the first six counts of the superseding indictment as a violation of petitioner's Fifth Amendment right under Kastigar v. United States, 406 U.S. 441 (1972) and 18 U.S.C. 6002-6003, the following is submitted.

In Kastigar, the Supreme Court broadly held that any direct or indirect use against a defendant of testimony given under a grant of immunity violates the Fifth Amendment and is prohibited. The "heavy burden" squarely rests with the prosecution "to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Kastigar, 406

U.S. at 460, 461. Implementing this requirement, courts routinely require that the prosecution produce evidence to establish that all the evidence presented to the grand jury, and all the evidence utilized at trial, was derived from legitimate, independent sources. See United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977) (government must "demonstrate that the evidence presented to the federal grand jury and to the trial jury was derived from sources wholly independent of immunized testimony"). To make this showing, the prosecution must "systematically establish an independent source for each and every item of evidence which may have been considered by the indicting grand jury," United States v. Hampton, 775 F.2d 1479, 1488 (11th Cir. (1985) (emphasis supplied), or which was introduced at trial. See In re Sealed

Case, 791 F.2d 179, 182 (D.C. Cir.), cert denied, 479 U.S. 924 (1986); United States v. Semkiw, 712 F.2d 891 (3d Cir. 1983). In a significant majority of jurisdictions (see United States v. Garrett, 797 F.2d 656, 663-64 (8th Cir. 1986); United States v. Semkiw, 712 F.2d 891, 894-95 (3d Cir. 1983); United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976); United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973); United States v. Gerace, 576 F.Supp. 1185 (D.NJ 1983); cf. United States v. Kember, 648 F.2d 1354, 1363 (D.C. Cir. 1980) (citing McDaniel and noting that exposure by prosecutor meant "use admittedly had been made" of immunized testimony), the government must also show that all significant decisions by prosecutors, grand jurors, or jurors were unaffected by immunized testimony (often referred to as

nonevidentiary use). As the government bears the burden of proving that evidence "was free of taint and independently derived, [the court] may not infer findings favorable to it on these questions." United States v. Rinadli, 808 F.2d 1579, 1583 (D.C. Cir. 1987).

The foregoing requires that the counts of the indictment other than perjury be dismissed as a matter of law. The United States government made the decision to compel testimony and other information from petitioner in January of 1984 and then to indict and try him in 1987 for the matters as to which he had previously testified. Given the widespread use of immunized testimony by choice of the government, the broad use and derivative use of immunized testimony by the grand jury, the prosecutors, the jurors, and the witnesses, violation of

Kastigar was inevitable. Petitioner submits that it was impossible as a matter of law for the government to make the requisite showing that no use had been made of that testimony "in any respect" (Kastigar, 406 U.S. at 453 (emphasis in original), in securing his conviction, or that defendant "is in substantially the same position" (Id. at 462) as if his testimony had not been compelled.

The prosecution was required to come forward in an adversary evidentiary hearing to attempt to meet the heavy burden imposed upon it by the Fifth Amendment, the immunity statute, Kastigar, and implementing case law. These authorities require that the counts of the indictment must be dismissed unless the government can meet its extraordinary burden of proving an absence of direct or indirect "use" of petitioner's testimony,

with the defense having a fair opportunity to test the government's showing in a proper adversarial posture. Shown below are the essential components of such an inquiry.

Witnesses Critical to the Inquiry

(a) Grand Jury and Trial Witnesses - When the government introduces in the grand jury or at trial the testimony of a witness exposed to immunized testimony, it must make a witness-by-witness, item-by-item showing of the independent sources for all the evidence presented by the witness, and the court must make specific findings as to the sources of that evidence. See United States v. Rinadli, 808 F.2d at 1583-84. The purpose of such an inquiry is to assure that the testimony was not derived from listening to immunized testimony, influenced in any way by (or the product in any way of) the

immunized testimony, or the result of questions based on immunized testimony.

To try to meet its burden, the government must call as witnesses at an adversarial hearing each of the witnesses who testified at trial or before the grand jury and attempt to prove either that they were not exposed to the immunized testimony or that they made no direct or indirect use of petitioner's immunized testimony in their testimony before the grand jury or at trial.

(b) Grand Jurors - Courts of appeals uniformly have held that the Fifth Amendment, the federal use immunity statute, and Kastigar prohibit use of immunized testimony by the grand jury. See United States v. Garrett, 797 F.2d 656 (8th Cir. 1986); United States v. Hampton, 775 F.2d 1479 (11th Cir. 1985); United States v. Zielezinski, 740 F.2d 727 (9th

Cir. 1984); United States v. Tantalo, 680 F.2d 903 (2d Cir. 1982); United States v. Veery, 678 F.2d 856 (10th Cir. 1982); United States v. Anzalone, 555 F.2d 317 (2d Cir. 1977). In some courts exposure to immunized testimony requires dismissal (see Tantalo, Anzalone), whereas other courts reject this per se rule; but even these courts require that the government make an item-by-item showing of the independent sources of all evidence presented to the grand jury and that the government demonstrate that no "use" has been made in the decision to indict. In this case, in which the grand jurors inevitably were exposed to petitioner's immunized testimony by virtue of the government's decision to use petitioner's testimony and documents to continue its investigation and present evidence to the grand jury by the investigator's use of

the compelled testimony, the government must call each of the grand jurors as witnesses to permit the court to determine the extent of their exposure both inside and outside the grand jury room and to prove, with full adversarial testing, that they made no use of the testimony to which they were exposed in reaching their decision to indict.

(c) Trial Jurors - It is well established that a defendant's immunized testimony may not be used against him directly or indirectly at trial. See United States v. Rinaldi, supra. The government must therefore prove that no "use" had been made of petitioner's immunized testimony by jurors at trial. Particularly in this case, where the government made the decision to provide to the jury petitioner's unredacted grand jury testimony, the government bears the

burden of proving that the jurors were not exposed to that immunized testimony before or during trial or, if they were, that they made no "use" of that immunized testimony in their deliberations. To do so the government must call the jurors as witnesses to try to prove, in a formal adversarial proceeding, that there has been no violation of petitioner's constitutional or statutory rights by virtue of juror exposure to immunized testimony.

(d) Prosecutors - The clear majority of courts prohibit the "nonevidentiary" use of immunized testimony against a defendant. This term includes "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally

planning trial strategy." United States v. Crowson, 828 F.2d 1427, 1430 (th Cir. 1987), cert. denied, 109 S.Ct. 87 (1988). To attempt to meet its burden, the government must present as witnesses at an adversarial hearing each member of the prosecutorial staff who assisted in the investigation or prosecution of this case, to enable the court to determine the extent of his or her exposure to petitioner's immunized testimony, and to attempt to prove that none made any use of that testimony either as an investigatory lead to evidence (i.e., in deciding whom or what to subpoena, what questions to ask, whom to immunize, or whom to call as a government witness), or in a nonevidentiary way.

Documents Critical to the Inquiry

Counsel should have required the government to show that each government

exhibit was independent of the immunized testimony of petitioner. Counsel should have specifically requested that the IRS investigators' notes, memorandums, interview reports and internal files of the IRS, and any comparable file maintained by the IRS or any other agencies or other entities involved in the investigation or prosecution be produced to show that they were independent of the immunized testimony.

For the foregoing reasons, counsel for the defendant (petitioner) should have presented a motion to the court for dismissal of the counts of the indictment or, in the alternative, to request an inquiry which was mandated by the Fifth Amendment, Kastigar, and the federal use immunity statutes.

Issue II

Counsel for the defendant (petitioner) did not provide reasonably effective assistance as guaranteed by the Sixth Amendment. Counsel's errors were so serious as to deprive the defendant of a fair trial and, but for counsel's professional errors, the results would have been different. The list of errors shows that the petitioner was deprived of a fair trial.

In Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984), the court held that the defendant's claim that counsel's assistance was so deficient as to require reversal of a conviction must show two components. **First**, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that

counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. **Second**, the defendant must show that the deficient performance prejudiced the defense. This requires that counsel's errors were so serious as to deprive the defendant a fair trial, a trial whose result is reliable.

The errors that are enumerated below show that counsel made errors so serious that he was not functioning as counsel.

(1) Counsel did not request or demand that the government comply with 18 U.S.C. 6002 and/or 6003 and the holdings in Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), and prove to the court that the evidence to be presented at trial was independent of the evidence gained as a result of the Immunity Order.

(2) Counsel did not object to the admission of the immune testimony when presented by the government for use at trial, in violation of 18 U.S.C. 6002-6003 and Kastigar, supra.

(3) Counsel did not even respond to the court's invitation to settle the issue of immunity when invited to do so when the court, in response to the motion of acquittal, stated that it was troubled by the fact that the defendant (petitioner) was being prosecuted following a grant of immunity and asked counsel to argue the point. Counsel did not respond to the court's invitation to argue.

The use and admissibility of the immune testimony without objection was the cornerstone of the government's case against petitioner. Without the use of the immune testimony for its investigation, indictment, and trial of

petitioner, the government would have been unable to make a case, get an indictment or gain the conviction of petitioner. This case meets every requirement for ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668, at 687.

No clearer evidence of ineffectiveness of counsel can be shown than the failure of counsel to require the government to comply with a statute designed to protect the rights of the accused or the holdings of the United States Supreme Court requiring absolute action by the government plus a specific invitation by the court to raise and argue the issue of immunity. The trial record is void of any effective action to protect petitioner's statutory rights which were also guaranteed by the holdings of the United States Supreme Court.

(4) Counsel failed to call petitioner's only exculpatory witness (Kellogg), who saw Rosenbrook whiting out the checkbook stubs and knew that petitioner was out of town working on another case and, contrary to her testimony, petitioner was not in the office instructing her to alter the records or misappropriate, secret away and destroy the Thacher records.

(5) The defense attorney failed to introduce evidence showing the contradictory prior inconsistent statements of the government chief witness, Susan Rosenbrook, whereby:

a) While under oath Rosenbrook claimed to have made alterations to the records on March 26, 1984, two days after the records were turned over to petitioner's attorney.

b) On another occasion she

claimed under oath the records were altered on March 22, 1984, (while petitioner was in the hospital) yet she claimed petitioner was present and directed her to make the changes.

c) The suppressed records showed that the U.S. Attorney and IRS investigators knew that Rosenbrook made no claim of a change before March 26, 1984, and verified that petitioner took the records home with him on the weekend of March 24, 1984.

d) Argument (without objection) by AUSA Melson that the changes took place on March 21, 1984, even though no evidence was presented to show the acts took place on March 21, 1984.

(6) Counsel failed to be knowledgeable of routine procedures required to be known of a reasonably competent attorney practicing before the

federal court system, such as, when a motion for new trial was made, based on newly discovered evidence (violation of Department of Justice policy by failure to adhere to the requirements of the Attorney General Manual), the trial court ruled that any person practicing before the federal courts would have knowledge of the Attorney General's Manual and as such, diligence would have brought out the violation prior to or during the trial.

(7) Counsel for the defendant in trial preparation did rely heavily upon the expert witness's testimony to explain the records in question and repeatedly requested that the court continue the case until the expert witness could testify. Following the trial and during the preparation for the appeal, it was learned that counsel for the defendant voluntarily permitted the non-appearance of the expert

witness whose father had been buried during the week preceding the trial of the defendant.

(8) Counsel failed to argue to the jury that Rosenbrook had made a judicial admission (Massie v. Firestone, 134 Va. 450, 114 S.E. 652 (1922)) whereby the witness can rise no higher than her own testimony. Rosenbrook stated in cross examination that petitioner "didn't" instruct her to alter the documents and testified that she had so advised the grand jury investigator on June 25, 1984.

(9) As stated by the court, counsel failed to exercise due diligence and interview the after-discovered witnesses who were able to present independent evidence that petitioner was not in his office at the time of the alleged incident.

(10) As stated by the court, counsel failed to exercise due diligence in locating the independent witness who was able to corroborate that Dorothy Machen had instructed Rosenbrook to correct the records before January 30, 1984.

Issue III

The petitioner's due process rights were violated when perjury, material to the issues in the case and known to the prosecution, was used by the government to gain the indictment and conviction of the defendant in violation of Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), and United States v. Mesarosh, 352 U.S. 1 (1956).

The dignity of the United States Government will not permit the conviction of any person on tainted testimony, so said the United States Supreme Court in Mesarosh v. United States, 352 U.S. 1, 1 L.Ed. 2d 1, 77 L.Ed. 1 (1956). The court, in finding that a conviction was tainted by perjury, ruled that there could be no other just result than to award the petitioner a new trial.

In the line of cases starting with

Mooney v. Holohan, 294 U.S. 103 (1935), and moving in content through Alcorta v. Texas, 335 U.S. 28 (1957), Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Surpeme Court of the United States has held that the prosecutors have a fundamental duty not to suborn perjury (Mooney), not to use evidence known to be false (Alcorta) and to correct state witnesses who lie (Napue). Each of these duties protects the individual defendant. Most significant is the protection against perjury or the possibility of perjury that strikes at the heart of the judicial system in its role as the finder of truth. When the prosecutor involves himself in perjury, he lends official sanction to the fraud.

In Berger v. United States, 295 U.S. 78-89 (1935) the court held that it

is as much the duty of a prosecuting attorney to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one. In Berger, at 87, the court held that:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

The court held in Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124, 70 S.Ct. 663, 668 [100

L.Ed. 1003], that:

> "The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. . . . [f]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

In U.S. v. McGowan, 423 F.2d 413 (4th Cir. 1970), in ruling that the appellant was prejudiced by the denial of an opportunity to examine the Grand Jury testimony, the Court held that if the witness's earlier testimony is inconsistent with his trial affirmations, the truth of the witness's previous evidence is not at stake and any variance is usable only to shake later testimony.

The records of this case clearly show the following specific acts of misconduct whereby the government used perjury to

gain a conviction.

Both Assistant U.S. Attorneys, Justin Williams and Kenneth Melson, were present at trial and, in violation of their constitutional duty to represent the government ethically, violated their duty.

SPECIFIC ACTS OF MISCONDUCT WHICH HAVE NEVER BEEN DENIED BY THE GOVERNMENT

Perjury Condoned by the Prosecution

1. Justin Williams and Kenneth Melson, Assistant United States Attorneys, knew that the Thacher records had not been misappropriated, secreted away and destroyed by petitioner but, instead, knew from Thacher's grand jury testimony that Thacher had retained the alleged stolen records in his possession and that Kenneth Melson as well as Investigators Anderson and Rice had seen those records on October 18, 1984. Williams, who read the 1984 Thacher grand jury testimony to the 1987

grand jury, did therefore know that the Thacher records had not been stolen and destroyed, as testified to by Rosenbrook. Williams and Melson, however, condoned the perjury of Susan Rosenbrook and used the known perjured testimony of Rosenbrook to gain petitioner's conviction.

2. Williams and Melson knew that Durkin, the IRS supervisor, was presenting perjured testimony to the jury when Durkin claimed that the actions taken by Kellogg were prohibited by the IRS when, in fact, Treasury Regulation 230 permitted the action taken by Mark Kellogg.

3. Williams knew that Investigator Rice presented perjured testimony to the trial jury when Rice testified that he had not received the overhead summary sheets and whited out checkbook stubs on June 7, 1984. Williams knew that during Investigator Rice's first grand jury

appearance, Rice testified on three separate occasions that petitioner had provided the changed summary sheets and whited out checkbook stubs on June 7, 1984.

4. Williams, during Investigator Rice's second grand jury appearance, attempted to have Rice retract his earlier grand jury testimony when he (Rice) admitted on three occasions that the government had received the 1983 summary sheets and whited out checkbook stubs. Melson knew that Rice was presenting perjured testimony to the jury when Rice testified that he had not received the overhead summary sheets and stubs on June 7, 1984.

5. Williams and Melson knew that Investigator Albert C. Anderson presented perjured testimony when Anderson testified to the jury that he had not been involved

in the investigation of Kellogg and/or petitioner after March 20, 1984.

6. Williams knew that he was knowingly presenting evidence that would mislead the jury when he permitted Melson to claim during closing argument that petitioner had not presented to the government the corrected summary sheets and the whited out checkbook stubs on June 7, 1984.

7. Williams knew that he was making a false claim to the court when he argued to the court the admissibility of an alleged prior consistent statement of Rosenbrook under 801(d)(1)(B) and this was known by Melson. Williams knew from the October 16, 1984, investigative report of Rice that Rosenbrook had told Thacher about her whiting out the checkbook stubs after Kellogg had caught her in the act and before she alleged that the changes to

the summary sheets were made. Williams therefore knew that Rosenbrook's motive to fabricate arose before she made her statement to Thacher, yet Williams suppressed the memorandum and falsely argued to the court that Rosenbrook had no motive to fabricate when the alleged statements were made. Williams further knew that by his false reversal of the facts in the case he was misleading the court.

8 (a). The prosecutors knew that Investigator Rice perjured himself before the grand jury when Rice testified that Mark Kellogg wanted to represent the Hill Estate before the IRS in an audit situation. The secretly recorded telephone conversation by the IRS between Durkin of the IRS and Kellogg shows that Kellogg stated that he did not and would not represent the Hill Estate before the

IRS.

(b) The prosecutors knew that Investigator Rice also perjured himself before the grand jury when Rice testified that Mark Kellogg did represent the Hill Estate before the IRS in an audit situation.

9. Williams did perjure himself when he submitted his altered affidavit to the United States Court of Appeals for the Fourth Circuit in lieu of a true copy of the affidavit he originally filed with the U.S. District Court for the Eastern District of Virginia, Alexandria Division. Williams had at that time been accused of prosecutorial misconduct of intimidating a defense witness.

10. The prosecution knew that Thacher was presenting perjured testimony to the jury when Thacher claimed that he was not present when Investigators Rice

and Anderson interviewed Machen on March 20, 1984.

11. Williams did know that his closing argument was based on Thacher's false claim that the Thacher records were identical to the admitted records. Melson knew that the said Thacher records were not identical to those introduced at trial but failed to correct Thacher's perjured testimony.

12. The prosecution knew that Rosenbrook presented perjured testimony to the jury when she testified that Machen had instructed her to change the summary sheets for 1983, misappropriated, secreted away and destroyed the Thacher records and instructed her to add white out to the overhead account checkbook stubs, all on the same day, because Kellogg, whom the prosecutor had neutralized as a defense witness, had, while under an order of

immunity before the grand jury, testified he had caught Rosenbrook adding white out to the overhead account checkbook stubs and that petitioner was nowhere near the office as petitioner was out of town when he (Kellogg) caught Rosenbrook whiting out the checkbook stubs.

13. The prosecution knew that Thacher was presenting perjured testimony to the jury when Thacher changed his trial testimony from his grand jury testimony. Thacher's grand jury testimony was that he was present when the IRS conducted its interview with Machen and that IRS Investigator Anderson had said that he would telephone petitioner if the subpoena of March 20, 1984, was to be honored. Williams knew that Thacher's denial at trial was false when Thacher denied that he was present during the interview and that Anderson had advised petitioner that

he (Anderson) would call him if the government would execute on the March 20, 1984, subpoena.

14. The prosecution knew that Thacher had retained the original copies of his records and that petitioner had not misappropriated, secreted away and destroyed Thacher's records as Susan Rosenbrook falsely claimed. Williams, in spite of his personal knowledge that Rosenbrook had made a false claim, did falsely argue to the jury that petitioner had taken Thacher's records.

15. Melson knew from the memorandums of contact made by Rice and suppressed by the government that Rosenbrook and Rice reviewed the records together on June 25, 1984, and Williams admitted on November 20, 1987, that the records were received in June/July 1984.

16. Melson did condone the perjury

of Justin Williams when he argued before the U.S. Court of Appeals for the Fourth Circuit that Justin Williams could defend himself against the allegation that Williams had submitted an altered affidavit to the Fourth Circuit in lieu of the affidavit that Williams submitted to the U.S. District Court.

17. Thacher knew that petitioner had not misappropriated, secreted away and destroyed the Thacher records but falsely claimed to the jury at trial that his records were identical to the admitted records when, in fact, he knew his statement was false.

18. Thacher perjured himself when he denied that he was present during the IRS interview between Anderson, Hackney and Machen on March 20, 1984.

19. Thacher perjured himself when he changed his testimony at trial to say

that he was not present during the interview between Anderson, Hackney and Machen on March 20, 1984, when, in fact, he knew that he was present during the interview.

20. Both Melson and Williams knew that when Melson acted as a prosecutor after being present during petitioner's grand jury appearance, he was using petitioner's compelled testimony and the other information gained as a result of the immunity order compelling production, in violation of both 18 U.S.C. 6002-6003 and Kastigar v. United States, supra.

REASONS FOR GRANTING THE WRIT

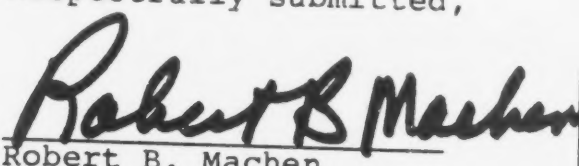
The Court should grant certiorari to instruct the Court of Appeals on the issue of how to use immune testimony, to show that perjury known to the prosecution will not be tolerated and that in criminal trials counsel must be diligent to protect

the constitutional rights of the accused.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Robert B. Machen
Pro Se
1418 South 21 Street
Arlington, VA 22202
703 920-3091

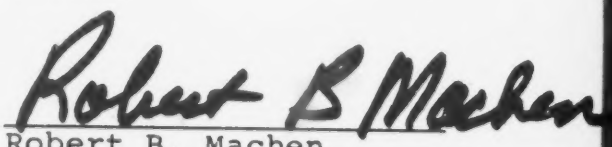
July 21, 1990

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 1990, I have caused copies of the accompanying Petition for a Writ of Certiorari to be served by first-class mail, postage prepaid, to the following:

William C. Bryson
Acting Solicitor General
U.S. Department of Justice
10th & Pennsylvania Ave., N.W.
Room 5614
Washington, D.C. 20530

Justin W. Williams, Esquire
Assistant U.S. Attorney
1101 King Street
Suite 502
Alexandria, VA 22314



Robert B. Machen

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed
May 22, 1990

No. 89-6842

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT B. MACHEN

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court,

/s/John M. Greacen
Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-6842

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

ROBERT B. MACHEN,
Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CR No. 87-234-A; C/A No. 89-981-AM)

Submitted: March 15, 1990
Decided: April 26, 1990

Before SPROUSE, CHAPMAN, and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Robert B. Machen, Appellant Pro Se. Justin W. Williams, Assistant United States Attorney, Alexandria, Virginia, for Appellee.
Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Robert B. Machen appeals from the district court's order refusing relief under 28 U.S.C. Section 2255. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. United States v. Machen, CR No. 87-234-A; C/A No. 89-981-AM (E.D. Va. Sept. 5, 1989). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
	)	
-V-	)	CRIMINAL NO.
	)	87-234-A
ROBERT B. MACHEN	)	CIVIL ACTION NO
Defendant.	)	87-981-AM

O R D E R

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the motion of the defendant pursuant to 28 U.S.C. Section 2255 to vacate, set aside or correct the sentence imposed on January 8, 1988, is denied.

/s/Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 5th, 1989

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
	)	
-V-	)	CRIMINAL NO.
	)	87-234-A
ROBERT B. MACHEN	)	CIVIL ACTION NO
Defendant.	)	87-981-AM

MEMORANDUM OPINION

This action is before the court on the defendant's motion pursuant to 28 U.S.C. Section 2255 to set aside, vacate, or correct the sentence of imprisonment imposed on January 8, 1988. That sentence was imposed following a jury conviction of the defendant on December 10, 1987, on three counts of a seven-count superseding indictment. The convictions were for obstruction of justice in violation of 18 U.S.C. Section 1503 (Counts I and VI) and tampering with a witness in violation of 18 U.S.C. Section 1512 (Count IV). The defendant was found not guilty on Count V,

another witness tampering count, and a mistrial was ordered on Counts II and III (obstruction of justice counts) and Count VII (perjury) after the jury was unable to agree on those counts. Counts II, III and VII were then dismissed without prejudice on motion of the United States. On January 8, 1988, the defendant was sentenced to imprisonment for 12 months each on Counts I, IV and VI, to run concurrently. In addition, fines totalling $10,000 were imposed.

The defendant appealed and his convictions were affirmed in an unpublished opinion of November 8, 1988 (No. 88-5012). In the meantime motions for a new trial had been denied on January 15, 1988 and July 15, 1988. Following the November 8, 1988 affirmance, this court again denied a motion for a new trial on

December 30, 1988. The present motion was filed on July 3, 1989. The government has responded and the defendant has filed a reply to that response.

The defendant bases his motion on six grounds:

1. Counsel for the defendant did not provide reasonably effective assistance as guaranteed by the Sixth Amendment. Counsel's errors were so serious as to deprive the defendant of a fair trial and, but for counsel's professional errors, the results would have been different. The list of errors shows that the defendant was deprived of a fair trial.

2. The defendant's due process rights were violated when perjured testimony (material to the issues in the case and known to the prosecution) knowingly was used by the government to gain the

indictment and conviction of the defendant. See Berger v. United States, 295 U.S. 78, (1935); Mesarosh v. United States, 352 U.S. 1 (1956).

3. The government failed to provide exculpatory information as required by Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976), material which was required to be produced by an order of the court.

4. The defendant's due process rights were violated when the prosecution used the defendant's legislatively immunized testimony presented to the grand jury and his claim of a Fifth Amendment privilege to infer guilt and impeach his credibility in a subsequent criminal trial. See Portash v. New Jersey, 440 U.S. 450 (1979); Grunewald v. United States, 353 U.S. 391 (1956).

5. The defendant's due process rights were violated when the defendant was provided production act immunity as well as use immunity and thereafter prosecuted for the act of producing the subpoenaed documents when he was not convicted of perjury, making a false statement, or failing to comply with the order of immunity. See 18 U.S.C. Sections 6002 and 6003; Kastigar v. United States, 406 U.S. 441 (1972.

6. The defendant's due process rights were violated when the prosecution violated Justice Department policy by compelling the appearance of a grand jury target and thereafter prosecuting the target for the compelled testimony given under the Order of Immunity and subpoena. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service

v. Dulles, 354 U.S. 363 (1957).

Grounds 2 through 6 must be dismissed because they were raised on direct appeal by the defendant. A comparison of the defendant's brief on appeal with his present motion makes this abundantly clear. In ground 2, the defendant complains of the prosecution's knowing use of the perjured testimony of witnesses Thatcher, Rice, Durkin and Rosenbrook. What the defendant has done in his motion is take the same witnesses whose testimony he sought to discredit as false in his unsuccessful appeal brief, and added that the testimony was not only false but that the prosecutors knew it to be such. Although not as emphatically, the defendant had already asserted this in the appeal brief as to Thatcher (Issue VIII), Rosenbrook (Issue XVII), Anderson (Issue

XVIII) and Durkin (Issue XIX).

Ground 3 asserts a failure to provide exculpatory evidence. This, of course, was the subject of Issue VI on appeal, and covered the role of Kellogg as well as Rosenbrook. Little is added in ground 3.

Ground 4 addresses the immunity issue which was the same issue covered by Issue III in the appeal brief.

Ground 5 questions the immunity grant followed by the prosecution, a subject addressed in Issues I and III in the appeal brief.

Ground 6 asserts the violation of Department of Justice policy in prosecuting the defendant. It is in almost the identical language of Issue XII of the appeal brief.

In each ground the defendant has elaborated on basically the same issue,

though perhaps more articulately than as argued on appeal. Defendant is mistaken when he asserts, as he does in his reply brief, that these issues were not considered by the Court of Appeals in its November 8, 1988 decision. The court simply, as it stated, found them unworthy of discussion. In any event, those matters which the defendant has added to the matters previously raised would not have altered the outcome of the trial and do not persuade the court that the defendant's due process right to a fair trial has been violated.

Ground 1 asserts that trial counsel rendered the defendant ineffective representation. Given that counsel secured an acquittal on four out of seven counts, the assertion would seem facially suspect, but since the issue cannot

ordinarily be addressed on direct appeal (and was not on the appeal in this case), it must be addressed now.

A litany of perceived omissions on the part of trial counsel are presented by the defendant. Most of these relate to such things as failure to object to certain testimony or argument of government counsel, failure to ask for a particular instruction, failure to pursue a particular line of cross-examination and failure to pursue certain pretrial procedures. None of these, alone or in combination, amount to anything but hindsight, and the omissions do not amount to a showing that counsel's performance fell below the range of competence demanded of attorneys in criminal cases so as to be deficient within the meaning of Strickland v. Washington, 466 U.S. 668,

689 (1984).

Nor does counsel's performance drop below that range when the few specific instances which warrant discussion are considered. Principal among these is the asserted failure of trial counsel to insist that, in light of the previously granted production immunity, the government prove that evidence to be presented at trial had a source independent of that gained as a result of the immunity grant. The defendant relies on Kastigar v. United States, 406 U.S. 441 (1972), on this issue. Even assuming that such a burden exists where the immunity is the limited one of production, the direct appeal in this matter forecloses it as constituting ineffective representation. The issue was raised and thoroughly briefed by the defendant's brief on

appeal. Indeed it is the first issue presented there. The Court of Appeals was, as with most of the other issues raised on appeal, unpersuaded; further, there is no indication that consideration by the Court of Appeals was rejected because it was not raised at trial. It would be singular to find ineffective representation for failure to press an issue which the Court of Appeals has decided was without merit. The so-called Kastigar issue had its day in this case.

Nor can trial counsel be faulted for the failure to call Kellogg as an exculpatory witness. Kellogg was an uncertain quantity. Neither the defense nor the prosecution could be sure of what he would say if called. It is not known, even today, what his testimony would have been, or if he would have testified at

all. The court's observation of the defendant, himself a practicing attorney, during the trial and in pretrial proceedings, satisfies the court that he was an active participant in planning the strategy of the trial. It is inconceivable to the court that if the defendant had thought Kellogg would have proved helpful at trial, the defendant would not have insisted that he be called. Kellogg had come out at trial as the possible "bad guy" in the whole affair, one whom, it was suggested, was responsible for the defendant's plight. It was easier to do this if he was not there to deny it. Sensible trial strategy would be to stay away from him, which is exactly what was done.

The failure to introduce certain evidence to contradict the witness

Rosenbrook is asserted as an attorney omission. A thorough attack was made on her credibility, an attack which was apparently sufficient to justify an acquittal on Count V. To require more impeaching evidence on pain of being ineffective is to ask too much of counsel.

As indicated before, taking into account all of the omissions listed by the defendant, singly or in combination, the court does not find that, but for them, there is a reasonable probability that the result in the case would have been different. Thus, in addition to finding no deficiency in trial counsel's performance, the court concludes that the defendant has not met the prejudice showing required by Strickland, supra at p. 694. This, after all, as to those counts on which the defendant was found

guilty, was not a close case. He had a fair trial during which he was represented by diligent, competent and effective counsel - he is entitled to no more.

The motion to vacate, set aside or correct his sentence will be denied.

/s/Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 5th, 1989

Appendix D

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 88-5012

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ROBERT B. MACHEN
Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (CR-87-234-A)

Argued: October 13, 1988
Decided: November 8, 1988

Before RUSSELL and WILKINS, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Stephen A. Armstrong for Appellant. Kenneth Melson, First Assistant United States Attorney (Henry E. Hudson, United States Attorney; Justin W. Williams, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant, a lawyer, was convicted of obstruction of justice and witness tampering. He brought the case here with the assertion of nineteen separate claims of error.

The defendant received referral of a tax case from an agent of the Internal Revenue Service. The agent also provided assistance in the processing of the case, in violation of rules of the Service. Because of an investigation of the Revenue Agent, the defendant instructed his bookkeeper to alter some financial records. The altered documents were later submitted to a grand jury. Asked, on cross-examination, whether the documents were originals, Machen responded with a claim of his privilege against self-incrimination.

During the trial, Machen testified that he had wished to explain the altered documents to the grand jury. In response, the prosecution introduced evidence of the fact that, before the grand jury, he had claimed his Fifth Amendment privilege. Having cut off his cross-examination before the grand jury by his claim of his Fifth Amendment privilege, the defendant may not claim, before the trial jury, that he had wished to tell his whole story to the grand jury. If he makes such a claim during the trial, evidence of the fact of his claim of his Fifth Amendment privilege becomes admissible. Robinson v. United States, 108 S.Ct. 864, 866 (1988).

None of the other eighteen contentions deserve mention.

AFFIRMED.